86 1514

NO. _____

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM 1986

WILLIAM J. CALLAHAN, PETITIONER

VS.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Counsel of Record:
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37 pp.

QUESTIONS PRESENTED FOR REVIEW

IS AN AWARD OF RESTITUTION, PURSUANT TO 18 U.S.C. §3651, TO PARTIES NOT "AGGRIEVED" BY THE OFFENSE FOR WHICH PROBATION WAS HAD AN "ILLEGAL SENTENCE" WITHIN THE MEANING OF RULE 35, FED. R. CRIM. P.?

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TABLE OF AUTHORITIES

REFERENCES TO THE OFFICIAL OR UNOFFICIAL REPORTS OF THE FEDERAL COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS

References to the record shall be noted as follows:

Appended hereto is a copy of the Modification Order of the District Court for the Central District of Illinois; United States v. William J. Callahan, No. 83-40017; No. 84-40007 (C.D. Ill. May 8, 1986). (Hereinafter references to same will be noted as "App. II"). Also appended is a copy of the Federal Court of Appeals Order; United States v. William J. Callahan, No. 83-40017, No. 84-40007 (7th Cir. Dec. 22, 1986). (Hereinafter, references to the same will be noted as "App. I.")

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

JURISDICTIONAL STATEMENT

I

DATE OF JUDGMENT

The United States Court of Appeals for the Seventh Circuit entered final judgment vacating and modifying the District Court order on December 22, 1986. (Appended hereto, pursuant to Supreme Court Rule 28.2 is bar member's affidavit of timely filing.)

II

JURISDICTIONAL STATUTES

Title 28 of the United States Code, §1254 confers jurisdiction upon this Court to review cases in the Courts of Appeals by writ of certiorari granted upon the petition of any party to a criminal case after rendition of judgment or decree.

STATUTES AND RULES

I.

FED. R. CRIM. P.

Rule 35. Correction or Reduction of Sentence

(a) Correction of Sentence. The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.

(b) Reduction of Sentence. A motion to reduce a sentence may be made, or the court may reduce a sentence without motion, within 120 days after the sentence is imposed or probation is revoked, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction of probation revocation. The court

shall determine the motion within a reasonable time. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision.

II

18 U.S.C. §3651 (1982)

§3651. Suspension of sentence and probation

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

Upon entering a judgment of conviction of any offense not punishable by death or

life imprisonment, if the maximum punishment provided for such offense is more than six months, any court having jurisdiction to try offenses against the United States, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may impose a sentence in excess of six months and provide that the defendant be confined in a jail-type institution or a treatment institution for a period not exceeding six months and that the execution of the remainder of the sentence be suspended and the defendant placed on probation for such period and upon such terms and conditions as the court deems best.

Probation may be granted whether the offense is punishable by fine or imprisonment or both. If an offense is punishable by both fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment. Probation may be limited to one or more counts or indictments, but, in

the absence of express limitation, shall extend to the entire sentence and judgment.

The court may revoke or modify any condition of probation, of may change the period of probation.

The period of probation, together with any extension thereof, shall not exceed five years.

While on probation and among the conditions thereof, the defendant -

May be required to pay a fine in one or several sums; and

May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; and

May be required to provide for the support of any persons, for whose support he is legally responsible.

The court may require a person as conditions of probation to reside in or participate in the program of a residential com-

munity treatment center, or both, for all or part of the period of probation: provided, That the Attorney General certifies that adequate treatment facilities, personnel, and programs are available. If the Attorney General determines that the persons's residence in the center or participation in its program, or both, should be terminated, because the person can derive no further significant benefits from such residence or participation, or both, or because his such residence or participation adversely affects the rehabilitation of other residents or participants, he shall so notify the court, which shall thereupon, by order, make such other provision with respect to the person on probation as it deems appropriate.

A person residing in a residential community treatment center may be required to pay such costs incident to residence as the Attorney General deems appropriate.

The court may require a person who is an addict within the meaning of section 425(a)

of this title, or a drug dependent person within the meaning of section 2 (q) of the Public Health Service Act, as amended (42 U.S.C. 201), as a condition of probation, to participate in the community supervision programs authorized by section 4255 of this title for all or part of the period of probation.

The defendant's liability for any punishment (other than a fine) imposed as to which probation is granted, shall be fully discharged by the fulfillment of the terms and conditions of probation. If at the end of the period of probation, the defendant has not complied with a condition of probation, the court may nevertheless terminate proceedings against the defendant, but no such termination shall affect the defendant's obligation to pay a fine imposed or made a condition of probation, and such fine shall be collected in the manner provided in Section 3565 of this title.

STATEMENT OF THE CASE

On April 18, 1984, petitioner was indicted by Grand Jury in the Southern District of Iowa, (Case No. 84-40007), on five (5) counts of "loan kickbacking" in violation of 18 U.S.C. §656, 1005 and 71. On or about this same period of time, petitioner was indicted by a Federal Grand Jury, (Case No. 83-40017), in the Central District of Illinois in a three (3) count indictment involving crimes in violation of 18 U.S.C. §215, 371 and 1343. Pursuant to plea agreement, counts two through five in Case No. 84-40007, and counts two and three in Case No. 83-40017 were dismissed. Petitioner entered a voluntary plea of guilty to count one of the indictment in Case No. 83-40017 and to count one of the indictment in Case No. 84-40007. Out of convenience to the parties, the cases were consolidated for sentencing.

The Honorable Michael M. Mihm, U.S. District Court Judge for the Central District of Illinois, sentenced appellant to three (3)

years imprisonment and imposed a $10,000 fine for the guilty plea in Case No. 83-40017 (the Illinois indictment) and five (5) years probation and restitution for the plea in Case No. 84-40007 (the Iowa indictment).

The amount of restitution ordered to be paid, pursuant to the probation for the Iowa indictment, initially was $65,000 represented as follows:

Mr. J. Lance Erwin - $12,500
Mr. Jerome Martin - $22,500
Mr. John Boast - $30,000

(App. II, p. 1)

Thereafter, the petitioner filed motion seeking correction of an illegal sentence, pursuant to Federal Rule of Criminal Procedure 35 (a), contending that the restitution imposed upon him in Case No. 84-40007 was greater than the amount as allowed by the statute. Pursuant to the 35 (a) motion, Judge Mihm reduced the total restitution from $65,000 to $60,000 by ordering, in part, that restitution to Mr. Erwin be reduced by

$10,000. The modified restitution order reflected the following:

Jerome Martin	-	$32,500
J. Lance Erwin	-	$ 2,500
John Boast	-	$25,000
TOTAL		$60,000

(App. II, p. 2)

Thereafter, petitioner sought appellate review of that portion of the District Court order upholding restitution to Mr. Boast and Mr. Martin as well as the circumstances supporting and surrounding the propriety of District Court sentencing in conjunction with 18 U.S.C. §3651. On appeal to the Federal Court of Appeals Seventh Circuit, the petitioner alleged that it was an abuse of discretion and, therefore, an illegal sentence for the Honorable District Judge to order restitution to parties not aggrieved by the charges for which petitioner received probation.

The Federal Court of Appeals did not review the case on the merits; that Court

held that the sentence was not an "illegal sentence" within the meaning of Rule 35 (a), but rather a sentence "imposed in an illegal manner" and, thereby, the original Rule 35 motion was untimely pursuant to Federal Rules of Criminal Procedure 35 (b). (App. I, p. 3). The Court of Appeals vacated and modified the District Court judgment concerning petitioner's original 35 (a) motion. (App. I, p. 3).

Petitioner seeks appellate review by this Court concerning the propriety of the Court of Appeals' dismissal based on Rule 35 Federal Rules of Criminal Procedure in that the Rule 35 motion was for correction of an "illegal sentence" rather than a motion to correct a sentence "illegally imposed."

BASIS FOR FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS

Petitioner was indicted, by Federal Grand Jury, and sentencing was had by the Federal District Court for the Central District of Illinois for violations of Title 18 of the United States Code, Federal Banking Laws, §371 and 1343. Petitioner was also sentenced for currency violations pursuant to 31 U.S.C. §5322 (b), and for misapplying banking funds 18 U.S.C. §656.

Fed. R. Crim. P. 35 allows a court to correct an illegal sentence at any time. Pursuant to Rule 35 (a) petitioner, pro se, moved the sentencing court to correct his sentence in that there was an alleged abuse of discretion by the sentencing court pursuant to 18 U.S.C. §3651.

REASONS FOR SUPPORTING REVIEW BY THE SUPREME COURT

IS AN AWARD OF RESTITUTION, PURSUANT TO 18 U.S.C. §3651, TO PARTIES NOT "AGGRIEVED" BY THE OFFENSE FOR WHICH PROBATION WAS HAD AN "ILLEGAL SENTENCE" WITHIN THE MEANING OF RULE 35, FED. R. CRIM. P.?

The Federal Court of Appeals for the Seventh Circuit held that petitioner's motion for correction of an illegal sentence, pursuant to F. R. Crim. P. 35, was a sentence "imposed in an illegal manner." The original motion was, thereby, dismissed as untimely. This holding is in direct conflict with Hill v. United States, 368 U.S. 424, 82 S. Ct. 468, 7 L. Ed. 2d 417 (1961).

The provision of Fed. R. Crim. P. 35 that is germane to this appeal reads, in pertinent part, as follows: "a. Correction of sentence. The Court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence." The language, "imposed in an illegal manner", was inserted into Rule 35 (a) as a

consequence of the Hill decision. (See, Fed. R. Crim. P., Notes by Adv. Comm. of 1966).

In Hill the litigation ensued in 1959 with the filing of a motion to vacate sentence under 28 U.S.C. §2255. Among various grounds for relief asserted, the motion alleged that the petitioner at the time of sentencing had been "denied the right under Rule 32 (a) of Fed. R. Crim. P., Title 18 U.S.C. to have the opportunity to make a statement in his own behalf and to present any information in mitigation of punishment." After dismissing petition's §2255 claim, this Court held that it could consider the motion as one to correct an illegal sentence under Rule 35 of the Fed. R. Crim. P. Thereafter, this Court held:

> [T]he rule's language and history make clear, the narrow function of Rule 35 is to permit correction at any time of an illegal sentence, not to re-examine errors occurring at the trial or other proceedings prior to the imposition of sentence. The sentence in this case was not illegal. The punishment meeted out was not

> in excess of that prescribed by the relevant statutes, multiple terms were not imposed for the same offense, nor were the terms of the sentence itself legally or constitutionally invalid in any other respect. (Emphasis original)

368 U.S. at 430

In response to Hill, Rule 35 was amended in 1966 to give the Court power to correct a sentence "imposed in an illegal manner" within the same time limits as those provided for reducing a sentence. It is, thereby, apparent that the "imposed in an illegal manner" language of Rule 35 deals with trial errors such as failure to afford a defendant the opportunity to make a statement in his behalf. [1]

It is specifically stated in Hill that an "illegal" sentence is one where the punishment meeted out was in excess of that

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[1] 368 U.S. at 430
Green v. United States, 365 U.S. 301, 81 S. Ct. 653, 5 L. Ed. 2d 670 (1961)
Machibroda v. United States, 368 U.S. 487, 82 S. Ct. 510, 7 L. Ed. 2d 473 (1962)

prescribed by the relevant statutes. In this cause, the "relevant sentencing statute", since the crimes occurred prior to 1983, is 18 U.S.C. §3651. [See, United States v. Ferrara, 746 F. 2d 908, 913 (1st Cir. 1984) for application of the scope of §3651.] 18 U.S.C. §3651 reads, in pertinent part;

> While on probation, and among the conditions thereof, the defendant ----
> May be required to pay a fine in one or several sums; and
> May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had. (Emphasis supplied)

Ordering restitution as a condition of probation is, pursuant to §3651, legal only if the Court awards restitution to parties "aggrieved" by the offense for which probation is had. [See as illustrative, United States v. Prescon Corp., 695 F. 2d, 1236, 1243, (10th Cir. 1982)]. The only logical construction of the "aggrieved parties" provision in §3651 is that it is a limitation on the sentencing court's discretionary power to

award restitution. It follows, therefore, that an award to parties not aggrieved in indictments for which probation is had is an award in excess of relevant statutory provisions. Wide discretion is given a sentencing judge in imposing conditions of probation, yet the probation act did not intend to authorize district courts to direct payment of funds, as a condition of probation, beyond express authorizations contained in the act. 695 F. 2d at 1243.

In this cause, the 7th Circuit chose to interpret §3651, as it relates to Fed. R. Crim. P. 35, as follows:

> In other words, Callahan contends that the sentencing court incorrectly applied the statute to the facts of his case, which, he claims, do not support a sentence of restitution in the amount and to the parties that he has been ordered to pay. This, however, is not a claim that the sentence is illegal; it is a claim that the sentence was imposed in an illegal manner.

(App. I, p. 3).

This logic is flawed. By this reasoning if, hypothetically, a defendant was convicted of manslaughter yet sentenced pursuant

to a statute enunciating penalties and punishments for murder, then said sentence would not be an "illegal sentence" but rather a sentence "illegally imposed" because the sentencing court incorrectly applied the statute to the facts of the case. In such a case prerequisite to the legality of punishment for murder would be the conviction for murder.

Likewise, in this matter, the pertinent sentencing statute mandates that, prerequisite the validity of restitution, the sentencing court must direct the restitution to parties aggrieved by the offense for which probation is had.

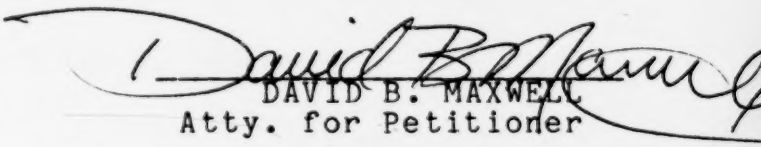
This matter involves federal statutes and federal case law which deal with important federal questions pertaining to relief from unjust convictions. There is also an apparent conflict between the Federal Court of Appeals for the Seventh Circuit's judgment in this matter and this Court's pronouncements in Hill v. United States and its pro-

geny. Petitioner, thereby, respectfully submits that this Court should grant appellate jurisdiction to hear and decide the issues and arguments concerning the propriety of the Seventh Circuit's dismissal as untimely of the petitioner's Rule 35 motion.

CONCLUSION

Petitioner respectfully submits that it is proper for this Court to grant certiorari to review the propriety of the Court of Appeals dismissal of petitioner's Rule 35 motion as untimely.

DATED this the 20th day of February, 1987.



DAVID B. MAXWELL
Atty. for Petitioner

ATTORNEY CERTIFICATE

I, DAVID B. MAXWELL, do hereby certify that I have forwarded a true and exact copy of the foregoing to L. Lee Smith, Asst. United States Attorney, 100 N.E. Monroe Street, Peoria, Illinois 61602 and to Solicitor General, Dept. of Justice, Washington, D.C. 20530, by placing the same in the U.S. Mail, postage prepaid, on the 20th day of February, 1987.

/David B. Maxwell/
DAVID B. MAXWELL

APPENDICES

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604
Submitted November 20, 1986*

December 22, 1986

Before
Hon. Richard A. Posner, Circuit Judge
Hon. Frank H. Easterbrook, Circuit Judge
Hon. Wilbur F. Pell, Jr., Senior Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff/Appellee,

NO. 86-1942 v.

WILLIAM J. CALLAHAN,
Defendant/Appellant

Appeal from the United States District Court for the Central District of Illinois
Rock Island Div.
No. 83-40017,
83-40007

Michael M. Mihm, Judge

ORDER

Defendant pleaded guilty to two

* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to need of Oral Argument." See Rule 34(a), Fed. R. App. P.; Circuit Rule 14(f). No such statement having been filed, the appeal has been submitted on the briefs and record.

counts, each contained in a separate indictment, of violations of federal law stemming from his involvement in a number of loan kickbacks. He appeals from the district court's modification of his sentence pursuant to Fed. R. Crim. P. 35. We vacate the district court's order modifying the sentence.

Defendant, William J. Callahan, a former bank officer, was indicted in the Southern District of Iowa[1] on five counts of loan kickbacking and conspiracy in violation of 18 U.S.C. §§ 656, 1005 and 371. The indictment alleged that Callahan had received kickbacks from J. Lance Erwin for procuring a loan for him. At about the same time, Callahan was also indicted in the Central District of Illinois[2] on four counts of conspiracy to commit wire fraud and currency violations, devising a scheme to defraud, and

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[1]Case No. 83-40007.

[2]Case No. 83-40017.

receiving fees for procuring loans in violation of 18 U.S.C. §§371, 1343, and 215. The Illinois indictment alleged that in furtnerance of an illegal conspiracy, Callahan had received certain amounts of money. Callahan later admitted that these amounts were kickbacks from Jerome Martin and John Boast. Because all of the charges involved much of the same witness and documentary evidence, Callahan moved for a transfer of the Iowa case to the Central District of Illinois. The Iowa case was transferred and the two cases were consolidated.

Pursuant to a plea agreement, defendant pleaded guilty to Count 1 of the Iowa indictment and Count 1 of the Illinois indictment. At his plea hearing, defendant admitted to receiving $2,500 from Erwin, $32,500 from Martin and $25,000 from Boast in connection with the offenses charged in the two indictments. In return for defendant's

guilty pleas, the remaining charges in both cases were dismissed.

On June 22, 1984, Callahan was sentenced to three years imprisonment and fined $10,000 in the Illinois case. In the Iowa case, the court sentenced him to five years probation and ordered him to pay a $5,000 fine. In addition, as a condition of Callahan's probation, the court ordered him to pay a total of $65,000 restitution to the following persons:

J. Lance Erwin $12,500,
Jerome Martin 22,500,
and John Boast ..... 30,000.

Subsequently, Callahan filed a motion for reduction of sentence pursuant to Fed. R. Crim. P. 35. The district court denied that motion. In February 1986, Callahan, acting pro se, filed a second Rule 35 motion, seeking a reduction of the amount of restitution to $12,500, arguing that the order directing him to pay restitution to Jerome Martin and John Boast was not

authorized by 18 U.S.C. § 3651.[3] On May 8, 1986, the district court entered an order correcting its sentence by reducing the total amount of restitution to $60,000 to be paid to:

J. Lance Erwin ..... $ 2,500,
Jerome Martin 32,500,
and John Boast ..... 25,000.[4]

Defendant appeals.

II.

Pursuant to Fed. R. Crim. P. 35 (a), a motion to correct an illegal sentence may be made at any time. A motion to correct a sentence imposed in an illegal manner or a motion to reduce a sentence, however, must be made within 120 days after the sentence is imposed. Fed. R. Crim. p. 35 (b). Although

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[3]The parties agree that, because all the crimes involved in the two cases occurred prior to 1983, § 3651 governs, and the district court could properly order restitution only as authorized by that section. For offenses committed after January 1, 1983, the Victim Witness Protection Act of 1982 made restitution available under 18 U.S.C. § 3579 as well. See United States v. Mischler, 787 F. 2d 240, 244-45 (7th Cir. 1986).

[4]The corrected order reflects the amounts Callahan admitted, at his plea hearing, having received. See supra at 3.

defendant characterized his motion as one to correct an illegal sentence, it is, in fact, a motion subject to the time limitation of Rule 35(b) and is, therefore, untimely.

A sentence which is in excess of that prescribed by the relevant statute, is an illegal sentence within the meaning of Rule 35(a). Hill v. United States, 368 U.S. 424, 430 (1962). The relevant statute in this case, 18 U.S.C. § 3651, however, prescribes no maximum amount of restitution that may be ordered. Section 3651 provides only that a defendant may, as a condition of probation, "be required to make restitution . . . to aggrieved parties for actual damages or loss caused by the offense for which conviction was had." Callahan'a objection to his sentence is that in the Iowa case, the only "loss caused by the offense for which conviction was had" is the $2,500 that he admitted receiving from Erwin, and, moreover, that Erwin is the only "aggrieved party"

in that case.[5] In other words, Callahan contends that the sentencing court incorrectly applied the statute to the facts of his case, which, he claims, do not support a sentence of restitution in the amount and to the parties that he has been ordered to pay. This, however, is not a claim that the sentence is illegal; it is a claim that the sentence was imposed in an illegal manner.

Thus, because defendant's motion was filed over nineteen months after sentence was imposed, it is untimely, and the district court lacked jurisdiction to consider the motion. United States v. House, No. 86-1120, slip op. at 2 (7th Cir. Oct. 29, 1986).

The court's order modifying defendant's sentence is, therefore,

VACATED

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5 On the present appeal Callahan challenges the modified order of restitution to Martin and Boast on the basis of these contentions. In view of our disposition of the appeal, we need not reach the merits of these arguments.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,

Plaintiff,

vs. NO. 83-40017
84-40007

WILLIAM J. CALLAHAN

Defendant

ORDER

Plaintiff has filed a motion pursuant to Federal Rule of Criminal Procedure 35(a) contending that the restitution imposed upon him in Case No. 84-40007 was greater than the amount admitted in the guilty plea and seeking a reduction.

William Callahan was sentenced to three years' imprisonment and fined $10,000 in Case No. 83-40017. In the companion case, 84-40007, he was sentenced to five years probation and ordered to pay restitution in the amount of $65,000. The Court has reviewed

the pleadings submitted by the parties and has concluded that there was an error in the restitution; however, it was not so great as Defendant contends. Pursuant to the original order, restitution was to be paid on follows:

Jerome Martin	$22,500
John Boast	30,000
J. Lance Erwin	12,500
TOTAL	$65,000

As corrected, the restitution payments should be made as follows:

Jerome Martin	$32,500
J. Lance Erwin	2,500
John Boast	25,000
TOTAL	$60,000

It is, therefore, ordered that the sentence imposed by this Court upon William J. ~~Cal~~lahan is hereby corrected by reducing the amount of restitution from $65,000 to $60,000.

ENTERED: This 8th day of May, 1986.

Michael M. Mihm
United States District Judge

2

AFFIDAVIT

STATE OF TENNESSEE

COUNTY OF SEVIER-

Comes now David B. Maxwell who, after having been duly sworn according to law, hereby makes oath and states that the foregoing Petition for Writ of Certiorari was placed in the United States Mail, postage prepaid, on the 20th day of February, 1987, within the time alloted, to the best of my knowledge, information and belief.

DATED this the 20th day of February, 1987.

David B Maxwell

DAVID B. MAXWELL

Sworn to and subscribed to before me this the 20th day of February, 1987.

Kathy Duncan

Notary Public

My commission expires 8/1/90

No. 86-1514

In the Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM J. CALLAHAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1514

WILLIAM J. CALLAHAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court's order requiring him, as a condition of probation, to pay restitution to certain persons constitutes an "illegal sentence" within the meaning of Rule 35(a) of the Federal Rules of Criminal Procedure and therefore that there is no time limit within which petitioner may move to correct his sentence.

1. In May 1984, petitioner pleaded guilty to one count of conspiring to commit wire fraud and currency offenses, in violation of 18 U.S.C. 371, and to one count of misapplying bank funds, in violation of 18 U.S.C. 656. The following month, he was sentenced to three years' imprisonment and a $10,000 fine on the conspiracy count and to five years' probation and a $5,000 fine on the misapplication count. In addition, as a condition of his probation, the district court ordered petitioner to pay a total of $65,000 in restitution to three persons. Pet. App. 3-4.

2. Petitioner, a former bank officer, was convicted for his participation in a loan kickback scheme. He was originally indicted in separate pleadings in federal courts in the Southern District of Iowa and the Central District of Illinois. The five-count Iowa indictment charged petitioner with loan kickbacks and conspiracy; the four-count Illinois indictment charged him with conspiracy to commit wire fraud and currency violations, devising a scheme to defraud, and receiving fees for procuring loans (see Pet. App. 2-3). On petitioner's motion, the Iowa case was transferred to the Central District of Illinois and the two cases were consolidated. Consistently with the plea agreement into which he had entered, petitioner pleaded guilty to the first count of each of the original indictments. He acknowledged at the plea hearing that he had received a total of $60,000 from three individuals in connection with the offenses charged (*id.* at 3-4). Following sentencing, petitioner moved for reduction of his sentence under Rule 35; the district court denied that motion (*id.* at 4).

In February 1986, 20 months after sentencing, petitioner filed a second Rule 35 motion. In that motion, petitioner alleged that the district court's order of restitution was excessive and hence that it constituted an illegal sentence that could be corrected at any time under Rule 35(a).[1] In

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[1]At present, Rule 35(a) provides that a "court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within [120 days after the sentence is imposed]." An amendment to Rule 35(a), however, which takes effect November 1, 1987, eliminates the temporal distinction between motions to correct an "illegal sentence" and motions to correct a sentence "imposed in an illegal manner." Pub. L. No. 98-473, §§ 215(b), 235, 98 Stat. 2015, 2031, as amended by Pub. L. No. 99-217, § 4, 99 Stat. 1728, and Pub. L. No. 99-570, Tit. I, § 1009, 100 Stat. 3207. As of November 1, 1987, Rule 35(a) will provide as follows:

> (a) *Correction of a Sentence on Remand.* The court shall correct a sentence that is determined on appeal under 18 U.S.C. 3742 to have been imposed in violation of law, to have been imposed as

petitioner's view, since 18 U.S.C. (& Supp. III) 3651 authorizes district courts to order restitution only "to aggrieved parties for actual damages or loss caused by the offenses for which conviction was had," only one of the three persons to whom he had been ordered to pay restitution was "aggrieved" within the terms of that section. It was petitioner's theory that as he was sentenced to probation only on the charge that originated in Iowa, and as only one person was victimized by that offense, only one person was "aggrieved" under Section 3651. The district court rejected the factual underpinning of petitioner's motion and upheld the order of restitution to the named persons. But, because the amounts petitioner was ordered to pay to each of the three did not conform to the amounts petitioner had admitted receiving, the court corrected the original order. This modification had the net effect of reducing the total restitution from $65,000 to $60,000 (Pet App. 8-9).

3. On appeal, petitioner renewed his assertion that only one of the three persons to whom he was ordered to make restitution was entitled to such relief. The court of appeals did not reach the merits of petitioner's claim. Rather, the court concluded that petitioner's Rule 35 motion was more accurately described as a motion to correct a sentence imposed in an illegal manner (which must be filed within 120 days of sentencing) than as a motion to correct an illegal sentence (which may be made at any time). Relying upon this Court's decision in *Hill* v. *United States*, 368 U.S. 424, 430 (1962), the court of appeals explained that a "sentence

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a result of an incorrect application of the sentencing guidelines, or to be unreasonable, upon remand of the case to the court —

(1) for imposition of a sentence in accord with the findings of the court of appeals; or

(2) for further sentencing proceedings if, after such proceedings, the court determines that the original sentence was incorrect.

which is in excess of that prescribed by the relevant statute is an illegal sentence within the meaning of Rule 35(a)" (Pet. App. 6). Since 18 U.S.C. (& Supp. III) 3651 "prescribes no maximum amount of restitution that may be ordered" (Pet. App. 6), the court viewed petitioner's contention—that he was ordered to pay restitution to persons not "aggrieved" by his offense—as constituting a claim "that the sentencing court incorrectly applied the statute to the facts of his case * * *. This, however, is not a claim that the sentence was illegal; it is a claim that the sentence was imposed in an illegal manner" (*id.* at 7). The court of appeals therefore held that Rule 35 set a jurisdictional time limit of 120 days following sentencing within which he could bring this claim; petitioner's failure to file his motion within the prescribed period left the district court without jurisdiction to consider the motion (*ibid.*). Accordingly, the court of appeals vacated the district court order modifying the sentence.

4. Petitioner contends (Pet. 15-21) that his Rule 35 motion was not time-barred and that the decision below conflicts with this Court's decision in *Hill* v. *United States, supra*. The decision of the court of appeals is correct; it does not conflict with *Hill* or with any other decision of this Court or of any court of appeals. Moreover, the present language of Rule 35(a) has been amended and 18 U.S.C. (& Supp. III) 3651 has been repealed effective November 1, 1987.[2] Accordingly, review by this Court is not warranted.

In *Hill*, this Court held that Rule 35, which then permitted district courts to correct "an illegal sentence at any time" did not apply to a claim by a defendant that he had been deprived of the opportunity to address the district court during sentencing, in violation of Rule 32(a) of the Federal

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[2]The amendment of Rule 35(a) is set out at note 1, *supra*. 18 U.S.C. (& Supp. III) 3651 is repealed pursuant to Pub. L. No. 98-473, Tit. II, § 212(a)(1) and (2), 98 Stat. 1987 (Oct. 12, 1984).

Rules of Criminal Procedure. Rule 35, the Court explained, was designed "to permit correction at any time of an illegal *sentence*, not to re-examine errors occurring at the trial or other proceedings prior to the imposition of sentence" (368 U.S. at 430 (emphasis in original)). Thus, the sentence in *Hill* "was not illegal" within the meaning of Rule 35, the Court stated, because "[t]he punishment meted out was not in excess of that prescribed by the relevant statutes, multiple terms were not imposed for the same offense, nor were the terms of the sentence itself legally or constitutionally invalid in any other respect" (*ibid.*).[3]

Here the court of appeals found, as did this Court in *Hill*, that the punishment imposed by the district court did not exceed statutory limits and was not legally or constitutionally invalid in any other respect. There is accordingly no conflict between the two cases. Moreover, as petitioner's convictions stemmed from at least one count that originated in each of the indictments and as he has admitted the unlawful receipt of funds from all three individuals to whom he was ordered to make restitution, the conditions of probation prescribed by the district court do not constitute an illegal sentence.

At all events, petitioner's dispute with the manner in which the court of appeals distinguished "illegal sentences" from sentences "imposed in an unlawful manner," does not warrant review by this Court since both the current Rule 35 and 18 U.S.C. 3651 have been repealed as of November 1, 1987. The Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, 98 Stat. 1987, creates a new sentencing

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[3]Congress subsequently overruled *Hill* in part by amending Rule 35(a) to its present form. The rule currently permits defendants to seek correction of lawful sentences "imposed in an unlawful manner" for up to 120 days following imposition of sentence. See Advisory Committee Note to 1966 Amendment to Rule 35, Fed. R. Crim. P.

guidelines system that will eliminate the need for either Section 3651 or the time limitation in Rule 35. The new statute provides that a sentence imposed by a district court is subject to appeal on grounds of illegality or an incorrect application of the sentencing guidelines. Consequently, as of November 1, 1987, the question presented in this case will not recur. There is, accordingly, no occasion for this Court to review a question that is of significance only to this case and will shortly be of only historical value.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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